UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

C.A.	03-148L	Tammy Passa, et al. v. Jeffrey Derderian, et al.
C.A.	03-208L	Ronald Kingsley, et al. v. Jeffrey Derderian, et al.
C.A.	03-335L	George Guidon, et al. v. Jeffrey Derderian, et al.
C.A.	03-483L	Chad Henault, et al. v. Jeffrey Derderian, et al.
C.A.	04-26L	Linda Roderigues, et al. v. Jeffrey Derderian, et al.
C.A.	04-56L	Charles Sweet, et al. v. Jeffrey Derderian, et al.
C.A.	04-312L	Albert Gray, et al. v. Jeffrey Derderian, et al.
C.A.	05-002L	Andrew Paskowski, et al. v. Jeffrey Derderian, et al.

OBJECTION OF PLAINTIFFS IN GRAY, ET AL. (C.A. NO. 04-312L) TO THE MOTION TO DISMISS FILED BY STATE OF RHODE ISLAND AND OWENS

Plaintiffs hereby object to Defendants State of Rhode and Owens' Motion to Dismiss as set forth in the Memorandum of Law in Support of this Objection.

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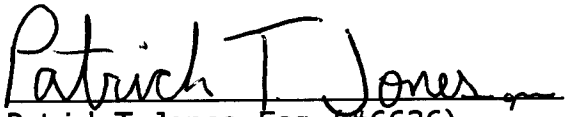

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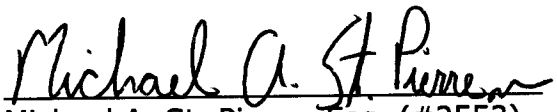

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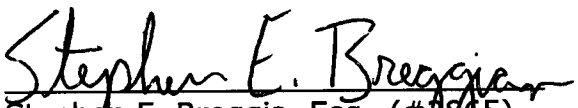

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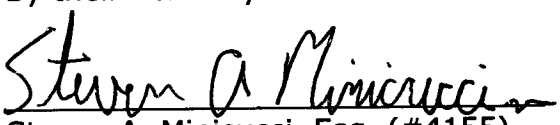

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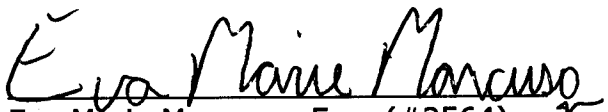

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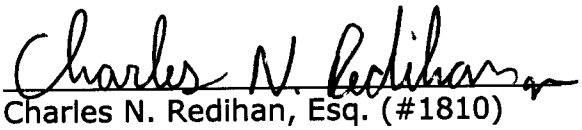

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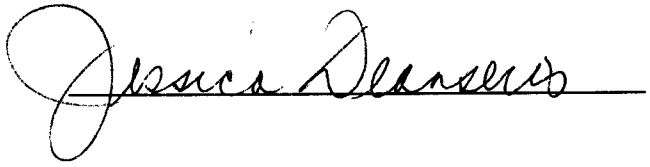

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MEMORANDUM OF THE PLAINTIFFS IN *GRAY, ET AL.* (C.A. NO. 04-312L) IN SUPPORT OF THEIR OBJECTION TO THE MOTION TO DISMISS FILED BY STATE OF RHODE ISLAND AND OWENS

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MEMORANDUM OF THE PLAINTIFFS IN *GRAY, ET AL.* (C.A. NO. 04-312L) IN SUPPORT OF THEIR OBJECTION TO THE MOTION TO DISMISS FILED BY STATE OF RHODE ISLAND AND OWENS

I. Introduction

This memorandum is in support of Plaintiffs' objections to the Motion to Dismiss filed by the State of Rhode Island and Owens.

The counts directed against these Defendants are XXXV and XXXVI respectively.

Plaintiffs have alleged that these defendants,

> negligently and carelessly failed to properly inspect The Station and enforce the laws of the State of Rhode Island proximately causing injuries and deaths to Plaintiffs. Such negligence included failing to enforce appropriate capacity and exit requirements, failing to discover and order remedied highly flammable interior finish within the building and failing to properly train and supervise state personnel responsible for enforcing the fire safety laws of Rhode Island.

(First Amended Master Complaint p. 97, ¶435). Plaintiffs allege that the negligence was egregious. (First Amended Master Complaint p. 97, ¶436).

In addition to the above allegations, by stipulation entered by this Court on January 4, 2005, the State of Rhode Island has agreed that the applicable portions of the First Amended Master Complaint ("FAMC") addressed against the State "shall be deemed to allege (a) that Dennis Larocque was acting in the capacity as agent for the State of Rhode Island and (b) that the State's negligence also arose from Larocque's acts and/or omissions.[1]

[1] Larocque was himself named as a Defendant in Counts XXXII and XXXIII. Larocque is also alleged to be an agent of the Town of West Warwick with regard to negligent performance of fire inspection activities and the like. (See Paragraph 425 of the FAMC p. 425)

At this stage of the proceedings, and before the initiation of any discovery, it is unclear whether Larocque was the agent of the Town, the State or of both. This is essentially a factual determination. American Underwriting Corp. v. R.I. Hospital Trust Company, 303 A.2d 121 (R.I. 1973).

It is fundamental that the State Defendants' motion must be denied unless it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 507, 122 S.Ct. 992, 995 (2002) (quoting, Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984)). This principle is so strong that "[t]he complaint should not be dismissed merely because plaintiffs' allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the Complaint to determine if the allegations provide for relief on any possible theory." 5A Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357. (emphasis added).

"Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Swierkiewicz, supra, at 515, 999 (quoting, Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974)).

II. This Litigation Is Not Barred By The Eleventh Amendment Or The Doctrine of Sovereign Immunity

The State Defendants have confused Eleventh Amendment immunity from suit in the federal courts conferred by the Constitution of the United States with common law immunity of the State of Rhode Island based on state law.

In Laird v. Chrysler, 460 A.2d 425, 426 (R.I. 1983), the United States District Court for the District of Massachusetts certified the question of "[w]hether

the waiver of sovereign immunity by the State of Rhode Island in its General Laws, Section 9-31-1 constitutes a waiver of its right not to be sued by reason of the [Eleventh] Amendment to the United States Constitution." The Rhode Island Supreme Court ruled that R.I. Gen. Laws § 9-31-1 manifests a legislative intent to "place the state in the same position as any other private litigant and thus amenable to suit in either state or federal court." Id. at 430. (emphasis added). Thereafter, in Della Grotta v. State of Rhode Island, 781 F.2d 343, 346-347 (1st Cir. 1986), the First Circuit stated that it would defer to the Rhode Island Supreme Court's interpretation of the legislative intent behind R.I. Gen. Laws § 9-31-1 as set forth in Laird.

A. The State Has Waived Its Sovereign Immunity For The Acts And Omissions Alleged

The Rhode Island Supreme Court has ruled on several occasions that the enactment of R.I. Gen. Laws § 9-31-1 constitutes a "blanket waiver" of immunity in tort actions such as the case at bar. For instance, in Gagnon v. State, 578 A.2d 656, 658 (R.I. 1990), the Rhode Island Supreme Court ruled that the State incorrectly perceived the effect of R.I. Gen. Laws § 9-31-1:

> In its brief the state incorrectly perceives its potential liability of § 9-31-1 as minimal. Quite to the contrary, however, this court had stated that although there are limits to its liability, the state has made a "blanket waiver" of its sovereign immunity by enacting § 9-31-1.

Gagnon, 578 A.2d at 658 (emphasis added) (citing, Laird v. Chrysler Corp., 460 A.2d 425, 429 (R.I. 1983); O'Brien v. State, 555 A.2d 334, 336 (R.I. 1989)).

It is also clear that, notwithstanding this blanket waiver, there are circumstances where the judicially enunciated "public duty doctrine" may bar

recovery. By the same token, there are judicially created exceptions to this doctrine that remove the bar and allow recovery.

Defendants cite cases from other jurisdictions that they urge would bar recovery in those jurisdictions, under the facts of this case. Plaintiffs can cite to cases in other jurisdictions where recovery would be allowed in those jurisdictions under the facts of this case. (See, for example, Daggett v. County of Mariposa, 770 P.2d 384 (Ariz. 1989); Brennan v. City of Eugene, 591 P.2d 719 (Ore. 1979); Coffey v. The City of Milwaukee, 247 N.W.2d 132 (Wis. 1976); State of Alaska v. Abbott, 498 P.2d 712 (Ala. 1972)).

Whether the actions brought herein against the State Defendants would be barred under Kentucky law or allowed under that of Wisconsin is not of any significance. The only meaningful issue is whether or not they are maintainable under Rhode Island law.

The State Defendants have asserted that Plaintiffs can bring this action if and only if, they can allege the breach of a special duty owed to them as specifically identifiable individuals. State Defendants' Memo. p.5. However, the cases relied upon by the State Defendants in support of this position were decided before the Rhode Island Supreme Court first enunciated the egregious conduct exception to the public duty doctrine in 1991. In Verity v. Danti, 585 A.2d 65, 67 (R.I. 1991), where the egregious conduct exception was first pronounced, the Rhode Island Supreme Court specifically stated, "It is important that we note that this abrogation of the public duty doctrine is not delineated in our previous cases addressing the same policy."

A more accurate analysis of the State Defendants' potential liability reveals that when it is alleged that the State is negligent in the performance of a governmental function, the State will be liable if: (1) it has acted egregiously; **or** (2) if the plaintiff is owed a special duty.[2] The Rhode Island Supreme Court has ruled that the egregious conduct exception to the public duty doctrine does not require Plaintiffs to be specifically identifiable individuals for liability to extend to the State:

> We have also held in certain instances that the negligence of the State or its political subdivisions is so extreme that the plaintiff need not prove that he or she was a specific, identifiable, and a foreseeable victim or a member of a group of such victims in order to recover.

Haley v. Town, 611 A.2d 845, 849 (R.I. 1992) (emphasis added).

The cases of Torres v. Damicis, 853 A.2d 1233 (R.I. 2004) and Haworth v. Lannon, 813 A.2d 62 (R.I. 2003), both decided after the recognition of the egregious conduct exception and relied upon by the State Defendants, actually provide support for Plaintiffs' cause of action. In Haworth, the Rhode Island Supreme Court ruled, "If either exception were applicable [egregious conduct or special duty], the Town would be liable for the tortious acts of its agent." 813 A.2d at 64. In Torres, grant of summary judgment for the defendant was upheld because the egregious conduct exception had not been met. 853 A.2d at 1241.[3] Notwithstanding the fact that Plaintiffs have alleged that Larocque owed them a special duty, Torres and Haworth establish that the egregious conduct exception to

---

[2] Plaintiffs allege that Owens and Larocque were negligent in an egregious manner and that Larocque owed a special duty to Plaintiffs. In addition, the inspections may have been an activity normally undertaken by private persons, yet another exception to the public duty doctrine discussed later herein.

[3] In both Haworth and Torres, the plaintiffs appealed from grants of summary judgment where no issue of material fact existed as to whether the special duty or egregious conduct exceptions to the public duty doctrine applied. Haworth, 813 A.2d at 63; Torres, 853 A.2d at 1253. Importantly, both cases had the benefit of discovery, unlike the case at bar.

the public duty doctrine does not require Plaintiffs to be a specifically identifiable class of individuals.

The State Defendants will not be afforded protection under the public duty doctrine if they had knowledge that they created a circumstance that forced an individual into a position of peril and subsequently chose not to remedy the situation. Verity v. Danti, 585 A.2d 65 (R.I. 1991). It is clear that the State/municipalities' knowledge can be actual or constructive. Bierman v. Shookster, 590 A.2d 402, 404 (R.I. 1991). Plaintiffs have alleged that all State Defendants were negligent in an egregious manner.

The circumstances of this case as discovery proceeds may prove yet more egregious than other cases in which liability has been upheld by the Rhode Island Supreme Court. In Verity, the State was aware of a tree which had existed for more than one hundred years and ultimately obstructed an entire sidewalk. 585 A.2d at 67. A pedestrian approached the obstruction, and was hit by an automobile when she stepped into the road to pass the tree. 585 A.2d at 65-66. In Martinelli v. Hopkins, 787 A.2d 1158, 1169 (R.I. 2001), a trial justice found that the Town of Burrillville failed to inspect a licensed premises, permitted an entertainer to assemble an indefinite crowd size, and had abundant notice that a festival was an extraordinary event. 787 A.2d at 1168. In Martinelli, the plaintiff was injured because a rotted tree fell on him when people attempted to urinate in the woods by traversing a snow fence that was attached to the rotted tree. 787 A.2d at 1163. Finally, in Bierman v. Shookster, 590 A.2d, 402, 404 (R.I. 1991), an automobile accident occurred in Providence as a result of a malfunctioning traffic signal. The

court ruled, "By failing to correct the malfunction, of which it should have been aware, the city jeopardized the safety of those utilizing the intersection in reliance on the traffic lights." 590 A.2d at 404. (emphasis added). The actions and omissions of the State Defendants are comparable (or may prove to be comparable) to the acts and omissions in Verity, Martinelli and Bierman, where egregious conduct was found to exist.

Finally, it is clear that the "creation" of a circumstance can occur by omission. For instance, in Verity the State failed to remove a tree. In Bierman, the City of Providence failed to repair a malfunctioning traffic light. In Martinelli, the Town of Burrillville licensed an event without inspecting the premises and "clos[ed] its eyes to risks and hazards that attendees would encounter."

In a real sense, the foregoing analysis is probably, at this stage at least, academic.

In order for the State Defendants to succeed with their 12(b)(6) Motion, the State Defendants must "...demonstrate to a certainty that [their] relationship with the Plaintiff does not come within an exception to the public duty doctrine." Haley v. Town of Lincoln, 611 A.2d 845, 849 (R.I. 1992). No burden is presently on Plaintiffs.

The Rhode Island Supreme Court has specifically stated that it is "virtually impossible" for the State to obtain judgment on the pleadings in cases involving the public duty doctrine.

> It is virtually impossible for the State to sustain such a burden when the pleadings are viewed in a manner most favorable to the plaintiff. Consistent with Rule 8's pleading requirements, the plaintiff is not obligated to provide in the complaint details concerning the state's

> awareness of or reaction to the circumstances surrounding his or her claim. Such information is, in any event, frequently unavailable to a plaintiff at the pleading stage. Any gaps in the pleadings regarding the state's conduct as it bears upon the plaintiff's action are to be read in the plaintiff's favor. In light of the fact-intensive exceptions to the public duty doctrine, the trial court is unlikely to be able to hold that the plaintiff could not establish the state's negligence under any set of facts that might be adduced at trial. Accordingly, we conclude that controversies in which the public duty doctrine are asserted as a defense will rarely be appropriate for disposition by means of a Rule 12(c) motion for judgment on the pleadings.

Haley, 611 A.2d at 849-50 (emphasis added)(expressly applying this holding to motions to dismiss for failure to state a claim under Rule 12(b)(6)).[4] Plaintiffs have not had the benefit of the discovery process to more fully develop the facts and circumstances surrounding the State Defendants' acts and omissions. In accordance with Haley, the State Defendants' 12(b)(6) motion should be denied.

Indeed, even as to the "special duty" exception, the facts as to the State Defendants' knowledge as to particular Plaintiffs is totally undeveloped at this time.[5]

Further, the public duty doctrine will not protect the State Defendants when their agent was performing an act which is one in which private persons also ordinarily engage. Yankee v. LeBlanc, 819 A.2d 1277, 1280 (R.I. 2003). It is alleged that The Station was also inspected by private individuals acting on behalf of insurance companies prior to February 20, 2003. The activities may have been identical or nearly so.

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[4] In St. James Condo Assn. v. Lokey 676 A.2d 1343, 1344 (R.I. 1996) the Rhode Island Supreme Court reversed the 12(b)(6) dismissal of plaintiffs' action which alleged that a town building inspector, had negligently inspected or failed to inspect the plans and construction of the project and had negligently issued occupancy permits for units with the development.

[5] Even if, arguendo, the actions of the State Defendants were not egregious, it may well be that at least as to some of the victims a special duty was owed.

B. It Is Premature To Find That Owens Has Statutory Immunity For His Acts

The State Defendants argue that Owens "had the broadest conceivable statutory protection" State Defendants' Memo., p. 17. This is simply wrong. Unlike the immunity enjoyed by judges, for example, the statutory immunity requires the presence of good faith and the absence of malice. The immunity of a judge, of course, is not so limited, as held by the United States Supreme Court in Mireles v. Waco, 502 U.S. 9, 11, 112 S.Ct. 286, 288 (1991) which ruled, "[J]udicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial." (emphasis added).[6] The decision of the United States Supreme Court in Mireles was followed by the Rhode Island Supreme Court in Sherman v. Almeida, 747 A.2d 470 (R.I. 2000).

§ 23-28.2-17 Requires That Inspections Be Done In Good Faith

R.I. Gen. Laws § 23-28.2-17, relied upon by the State Defendants for immunity, is not without preconditions. It provides, in pertinent part,

> ...[A]ny fire marshal, acting in good faith **and** without malice, shall be free from liability for acts performed under any of its provisions or by reason of any act or omission in the performance of his or her official duties in connection therewith.

(emphasis added). The State Defendants' Memorandum merely addresses the issue of malice and concludes that Plaintiffs' Complaint has not raised an issue of malice. State Defendants' Memo., p. 17. R.I. Gen. Laws § 23-28.2-17, however, mandates a two step analysis (i.e. "good faith and without malice") prior to any

[6] On its face, Mireles indicates bad faith or malice are factual issues not to be determined by a 12(b)(6) motion.

grant of immunity. Therefore, the factual issue of whether Owens acted in good faith must be resolved prior to any grant of immunity.

As indicated, supra, Plaintiffs' action alleges that Owens was egregiously negligent, which description connotes a lack of good faith. Plaintiffs' Complaint alleges that Owens failed to properly train and supervise personnel responsible to enforce the R.I. Fire Safety Code, failed to enforce capacity limits and exit requirements at The Station and failed to order remedied highly flammable interior finish.

Black's Law Dictionary, quoted with approval in State of Rhode Island v. DiPrete, 1997 WL 839899, 12 (R.I. Super.), in defining good faith states that it "generally speaking, means being faithful to one's duty or obligation." Black's Law Dictionary, p. 744 (6th ed. 1991). The issue of "good faith" as it applies to R.I. Gen. Laws § 23-28.2-20 was ruled upon by the Rhode Island Supreme Court in Vaill v. Franklin, 722 A.2d 793 (R.I. 1999). In Vaill, the Rhode Island Supreme Court reversed the Superior Court and ruled that "whether Franklin (a fire chief that performed an inspection at a business) is shielded from liability based upon qualified immunity based upon "good faith" is dependent on whether the inspection itself was reasonable under the circumstances in this case." 722 A.2d at 795. (emphasis added). Next, the Rhode Island Supreme Court ruled that summary judgment was improper because questions of material fact remained:

> However, questions of material fact remain as to whether consent had been given and the search was reasonable, or whether an emergency situation existed which necessitated a warrantless inspection.

722 A.2d at 796. (emphasis added). Of course, the parties in Vaill had the benefit of discovery, unlike the Plaintiffs in the case at bar. Serious questions of fact remain.

Even if Owens (and/or Larocque) are entitled to immunity under R.I. Gen. Laws § 23-28.2-17, the State is not thereby rendered immune.

In claiming the benefits of § 23-28.2-17 the State quotes only part of the statute. That part omitted from Defendants' quotation specifically provides that "[t]he state fire marshal, his or her deputies, . . . shall not render themselves liable personally, and they are hereby relieved from all personal liability for any damage that may accrue." R.I. Gen. Laws § 23-28.2-17. An employee's immunity is not transferable to his or her employer. As stated by The Second Restatement of Agency:

> Where Principal or Agent has Immunity or Privilege – In an action against a principal based on the conduct of a servant in the course of employment: (b) The principal has no defense because of the fact that: (ii) the agent had an immunity from civil liability.

Restatement Agency (Second) § 217, pp. 468-469 (1958). In fact, the comment following this section specifically states that "[i]mmunities, unlike privileges, are not delegable and are available as a defense only to persons who have them." Id. at 470. Even more, the comment continues by instructing, "The fact that the agent has an immunity from liability does not bar a civil action against the principal." Id.

This concept explains and justifies the holding by the Rhode Island Supreme Court in Schultz v. Foster-Glocester Regional School District, 755 A.2d 153 (R.I. 2000), which implicitly ruled that immunity conferred by statute to an employee will not extend to that individual's employer. In Schultz, an injured middle school

cheerleader filed suit against her school district and appealed a trial justice's ruling that none of the exceptions to the public-duty doctrine applied in her case. 755 A.2d at 155. Importantly, the defendant/appellee argued that the trial justice correctly ruled that the public-duty doctrine shielded it from liability and that "if the doctrine did not apply, the coach enjoyed immunity pursuant to P.L. 1956 § 9-1-48." 755 A.2d at 155.[7] In finding that evidence existed which suggested that the plaintiff was a specifically identifiable individual, the Rhode Island Supreme Court vacated the summary judgment and remanded the case for a trial on the merits as against the school district notwithstanding its "vicarious immunity" argument. 755 A.2d at 156.

It is clear that the Rhode Island Supreme Court has the power to affirm a justice of the Superior Court on grounds other than those which he utilized in determining the outcome of a case. Mall at Coventry Joint Venture v. McLeod, 721 A.2d 865, 869 (R.I. 1998). Certainly, the Rhode Island Supreme Court would not have remanded Schultz for a trial if the employer school district would ultimately be cloaked with the immunity granted to its coach under R.I. Gen. Laws § 9-1-48.

Immunity statutes, such as R.I. Gen. Laws § 23-28.2-17 must be strictly construed. Potter V. Charles v. Finch & Sons, 388 A.2d 614, 616 (N.J. 1978) ("[I]mmunity from tort liability is not favored in the law since it bars the injured person from the recovery of compensatory damages against the party who is otherwise responsible for the injury. For that reason, [immunity] statutes

[7] R.I. Gen. Laws § 9-1-48 provides that managers, coaches and instructors in interscholastic or intramural sports programs are granted immunity. This immunity is similar to the grant of immunity afforded to fire inspectors under R.I. Gen. Laws § 23-28.2-17.

. . . must be strictly construed and not extended beyond their plain meaning.") (citations omitted); Yen v. Avoyelles Parish Police Jury, 858 S.2d 786, 789 (La.App.3 Cir. 2003) ("A statute that grants immunities or advantages to a special class in derogation of general rights available to tort victims must be strictly construed against limiting the tort claimants' rights against the wrongdoer."). Because R.I. Gen. Laws § 23-28.2-17 explicitly limits its grant of immunity to personal liability of the fire marshal (under specific circumstances not necessarily satisfied here), strict construction of this statute dictates that its immunity not be extended to insulate the State.

Rhode Island case law regarding building inspectors also implicitly rejects the State's argument that it is entitled to the immunity potentially available to Owens and Larocque. R.I. Gen. Laws §§ 23-28.2-17 and 23-27.3-107.9, which provide immunity to fire inspectors and building inspectors, respectively, are identical in pertinent part.

In Haworth v. Lannon, 813 A.2d 62 (R.I. 2003), the plaintiff alleged that the town, through its building inspector, was negligent in failing to properly inspect homes. Id. at 64. The Rhode Island Supreme Court specifically ruled that if either exception to the public duty doctrine were applicable, "the town would be liable for the tortious acts of its agent, the building inspector." Id. at 64. (emphasis added). Although there is no reference to R.I. Gen. Laws § 23-27.3-107.9, Haworth stands for the proposition that a town will be liable for the tortious acts of its inspector despite an immunity statute which provides that the inspector will not be "liable personally." This implicit ruling is also contained in other building inspection cases including Quality Court Condominium Ass'n v. Quality Hill Development Corp., 641

A.2d 746 (R.I. 1994), Boland v. Town of Tiverton, 670 A.2d 1245 (R.I. 1996) and Torres v. Damicis, 853 A.2d 1233 (R.I. 2004). Therefore, even if Owens and Larocque are somehow afforded immunity under R.I. Gen. Laws § 23-28.2-17, the State remains liable for their negligence.

C. Legislative Immunity Is Not Applicable In This Case

Defendants' argument on this point is perfunctory and is contained in literally one sentence. "To the extent the State (and Fire Marshal Owens) have been sued for failure to enact legislation or to fund the office of the fire marshal (or any other office), those are legislative acts for which they have legislative immunity." State Defendants Memo. p. 17.

State Defendants' argument should be compared to the allegations actually made by Plaintiffs as quoted in the Introduction above, as well as to the very specific allegations[8] relating to Defendant Larocque who, for the purposes of State Defendants' Motion to Dismiss must be treated as an agent of the State.

D. Quasi-Judicial Immunity Is Not Applicable In This Case

In Suitor v. Nugent, 98 R.I. 56, 199 A.2d 722 (1964), the Rhode Island Supreme Court afforded quasi-judicial immunity to the Attorney General where he exercised prosecutorial discretion. Id. at 58, 723. The court ruled, "It is clear . . . that the Attorney General, in acting to enforce the criminal law, performs acts which require an exercise of judgment or discretion and are in the nature of judicial acts and that, when so acting, he acts as a quasi-judicial officer." 98 R.I. at 61, 199 A.2d at 724.

[8] FAMC pp.94-95.

Following its decision in Suitor, the Rhode Island Supreme Court extended quasi-judicial immunity to the Department of Environmental Management in Mall at Coventry Joint Venture v. McLeod, 721 A.2d 865 (R.I. 1998), and to the Rhode Island Disability Determination Service in Psilopoulos v. State of Rhode Island, 636 A.2d 727 (R.I. 1994).

Owens' and Larocque's actions and the functions of their agencies in this context are clearly distinguishable from the actions and agency functions involved in Psilopoulos and Mall at Coventry Joint Venture. Neither made disability determinations decisions based on (medical) recommendations of others. Neither had the kind of discretion discussed in Mall at Coventry Joint Venture, where DEM, an administrative agency, concluded that a proposal represented a significant alteration of fresh water wetlands and, therefore, requested a formal application from plaintiffs. In fact, in Mall at Coventry Joint Venture, the Plaintiff failed to exhaust its administrative remedies, unlike the case at bar.

The acts performed by Owens and Laroque were ministerial in nature and as a result they are not entitled to quasi-judicial immunity. Owens and Laroque were obligated to strictly enforce the quantifiable provisions of the R.I. Fire Safety Code without regard to their own opinions. Even more, the enforcement or administration of a mandatory duty at the operational level will be deemed to be ministerial even if professional expert evaluation is required:

> Generally speaking, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary [i.e., ministerial] if it involves enforcement or administration of a mandatory duty at the *operational level*, even if professional expert evaluation is required.

Beatty v. Washington Metropolitan Area Transit Authority, 860 F.2d 1117, 1127, 274 U.S. App. D.C. 25, 35 (1988). (emphasis added by Court) (citation omitted). Finally, in Coffey v. City of Milwaukee, 74 Wis. 2d 526, 535, 247 N.W.2d 132, 136-137, the Supreme Court of Wisconsin ruled that the act of inspection does not involve a quasi-judicial function because, "violations either exist or do not exist according to the dictates of the regulations governing the inspection, and not according to the discretion of the inspector."

The R.I. Fire Safety Code § 1-4.1 specifically states "[t]he State Fire Marshal is the sole authority having jurisdiction for the strict enforcement of the provisions of this Code. The State Fire Marshal shall have authority to appoint and certify as many deputy state fire marshals and assistant deputy state fire marshals as are deemed necessary to strictly enforce the provisions of this Code." (emphasis added). Importantly, § 1-4.1 goes on to indicate that discretion lies only with the Fire Safety Code Board of Appeal and Review:

> . . . the Fire Safety Code Board of Appeal and Review is the sole authority having jurisdiction to grant variances, waivers, modifications and amendments from or to review and accept any proposed fire safety equivalencies and alternatives to, the strict adherence to the provisions of this Code . . .

R.I. Fire Safety Code, § 1-4.1. (emphasis added).

In many respects, the R.I. Fire Safety Code is so precise that no discretion exists in identifying violations. A very few examples follow:

> R.I. Gen. Laws § 23-28.6-3. Maximum occupancy. - The occupant load . . . shall be determined by dividing the net floor area or space by the square feet per occupant . . .
>
> R.I. Gen. Laws § 23-28.6-4. Standing conditions. – (a) Standing patrons may be allowed in places of assembly at the rate of one

person for each five square feet (5 sq. ft.) of area available for standing . . .

R.I. Gen. Laws § 23-28.6-7. Egress passageways. – (a) The distance of travel from any point within the place of assembly to an approved egress opening therefrom shall not exceed one hundred-fifty feet (150') in non-sprinklered buildings . . . (c) All new doorways and connecting passageways to the outside, to be considered as means of egress, shall be at least thirty-six inches (36") in width and at least seventy-eight inches (78") in height,. . .All existing doorways and connecting passageways to the outside to be considered as means of egress, shall be at least thirty-two inches (32") in width and at least seventy-four inches (74") in height.

See especially – because of its applicability to the foam whose presence looms so large in these cases:

R.I. Gen. Laws § 23-28.6-15.

(3) Match Flame Test.

(i) Samples, in dry condition, are to be selected for tests and are to be a minimum of one and one-half inches (1 ½") wide and four inches (4") long. The fire exposure shall be the flame from a common wood kitchen match (approximate length 2 7/16 inches; approximate weight twenty-nine (29) grams per hundred), applied for twelve (12) seconds.

(ii) The test shall be performed in a draft-free and safe location. The sample shall be suspended (preferably held with a spring clip, tongs, or some similar device) with the long axis vertical, with the flame applied to the center of the bottom edge, and the bottom edge one-half inch (½") above the bottom of the flame. After twelve (12) seconds of exposure, the match is to be removed gently away from the sample.

R.I. Fire Safety Code § 1-4.4. Sections 1-4.5 and 1-4.14 provide the Chairman of the Board (not Owens or Larocque) with final authority to exercise judgment to summarily abate conditions which are in violation of the R.I. Fire Safety Code or to order the immediate evacuation of a premises deemed unsafe because of R.I. Fire Safety Code violations.

In support of its argument that Owens' position required the exercise of quasi-judicial discretion, the State Defendants' Memorandum points out that § 1-4.4 of the R.I. Fire Safety Code states, "The State Fire Marshal may order any person(s) to remove or remedy such dangerous or hazardous condition or material." State Defendants' Memo., p. 19. (emphasis added). The word "may" must be taken in the context provided by R.I. Fire Code §1-4.1 which calls for the "strict enforcement" of the Code. In fact, R.I. Gen. Laws § 23-28.2-4 entitled "Duties and Responsibilities of State Fire Marshal" states that, "[i]t shall also be the duty of the State Fire Marshal to enforce all laws of this state in regard to...(2) conducting and supervising fire safety inspections of all buildings regulated by the code within the state." It is clear that when Owens or his deputy state fire marshals were confronted with circumstances that constituted a violation of the Code, they were required to order the violation remedied. As stated in Black's Law Dictionary, "[C]ourts not infrequently construe 'may' as 'shall' or 'must' to the end that justice may not be the slave of grammar." Black's Law Dictionary 676 (6th ed. 1991).

In any event, "may" in this context gives the "discretion" to the inspector to order either removal or remediation, not to permit or disregard violations.

The distinction between prosecutors entitled to quasi-judicial immunity and a county building inspector who was not entitled to quasi-judicial immunity was explained in Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780 (2003). In Andrews, a building inspector, upon the advice of a prosecutor, filed a criminal complaint against three individuals alleging violations of the building code. Andrews, 266 Va. at 317, 585 S.E.2d at 783. Subsequently, actions were filed by the three

individuals against the prosecutor and the building official. 266 Va. at 317, 585 S.E.2d at 783. First, the court held that the prosecutor was entitled to quasi-judicial immunity:

> In each case where a prosecutor is involved in the charging process, under Virginia law, that action is intimately connected with the prosecutor's role in judicial proceedings and the prosecutor is entitled to absolute immunity from suit . . .

266 Va. at 321, 585 S.E.2d at 785. In sharp contrast, the same court in the same matter held that the building official was not entitled to quasi-judicial immunity:

> We conclude that Ring's duties as a building inspector are more akin to those of a police officer in the enforcement of laws, rules and regulations, than a prosecutor in the judicial process. As a matter of law, Ring is not entitled to the absolute immunity afforded by quasi-judicial immunity.

266 Va. at 325, 585 S.E.2d at 788. (emphasis added).

In Bolden v. City of Covington, 803 S.W.2d 577, 579 (Ky. 1991), relied upon by the State Defendants, a City Director of Housing Development was cloaked with quasi-judicial immunity. In defining the term "quasi-judicial," the court turned to Black's Law Dictionary which states:

> A term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and exercise discretion of a judicial nature.

Id. at 581. (citation omitted) (emphasis added). The authority of the City Director of Housing Development in Bolden is distinguishable from Owens' authority and more akin to the authority vested with the Rhode Island chairman of the fire safety code board of appeal and review (R.I. Gen. Laws § 23-28.3-2).

The distinction between quasi-judicial acts (which are entitled to absolute immunity) and investigatory acts (which are not) is further demonstrated by cases where prosecutors were not afforded absolute immunity. One example is the United States Supreme Court case of Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606 (1993), which held that a prosecutor was not entitled to absolute immunity when performing investigative functions:

> When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

Id. at 273, 2616. (internal citations and quotes omitted).

Significantly, even a prosecutor may not be entitled to absolute quasi-judicial immunity when he or she performs acts which are investigative or ministerial in nature. Neither Owens nor Larocque holds hearings, weighs evidence, draws conclusions from the evidence in hearings, or exercises discretion of a judicial nature. Their acts are not quasi-judicial but were ministerial in nature because they were under a statutory duty to "strictly enforce" the quantifiable provisions of the R.I. Fire Safety Code. Therefore, the State Defendants are not entitled to a blanket quasi-judicial immunity as to each and every function they perform.

It is clear from Buckley, supra, that prosecutors' absolute immunity or lack thereof will turn on the specific activity in question. 509 U.S. at 273, 113 S.Ct. at 2616. In the cases at bar, this, at a minimum, is presently a fact intensive question which cannot presently be decided definitively in favor of the Defendants.

It should also be noted that building inspectors and fire marshals perform very similar functions. As explained, infra, several cases in Rhode Island have held

that municipalities will be liable for the egregious negligence of local building inspectors (or violation of a special duty). Implicit in those cases is that the activities of building inspectors are not entitled to quasi-judicial immunity; therefore, Owens and Larocque do not enjoy this protection. Although Mall at Coventry Joint Venture was decided on different grounds by a superior court justice, the Rhode Island Supreme Court did not hesitate to rely on quasi-judicial immunity, sua sponte, to deny liability. As stated by that court, "We often have stated that this court may affirm a justice of the superior court on grounds other than those which he or she has utilized in determining the outcome of the case." Mall at Coventry Joint Venture, 721 A.2d at 869. Because this doctrine was not raised once by the Rhode Island Supreme Court in the cases of Quality Court Condominium Assn., Boland, Haworth, or Torres, supra, that court has implicitly held that local building inspectors are not entitled to quasi-judicial immunity.

III. Rhode Island State Law Does Recognize A Cause Of Action In These Cases

A. Duty

For the reasons set forth above and as follows, it is submitted that the State Defendants did owe Plaintiffs a duty of care.

1. Plaintiffs Do Not Depend On Regulatory Enactments To Create A Cause Of Action

As discussed above, in Rhode Island governmental entities will be held liable for the negligent performance of a building inspection if the conduct of the local official is egregious.[9] Rhode Island law recognizes a duty to act carefully after the assumption of an activity such as the inspection of a building or the undertaking to

[9] Or if a special duty is owed and possibly if the inspection is of the type performed by private parties.

supervise and train deputy state fire marshals and assistant deputy state fire marshals even if there is no duty to Plaintiffs initially to undertake the activity. This is the specific duty which Plaintiffs allege that the State Defendants breached. The duty to act carefully after affirmative conduct is distinguishable from cases where no attempt to enforce municipal regulations has occurred. Rhode Island case law evidences a public policy favoring municipal liability for negligently performed building inspections and the Rhode Island Supreme Court has imposed liability on municipalities for negligent building inspections.

The negligent performance of a building inspection has been held to be actionable in Rhode Island. For example, in Quality Court Condominium Ass'n v. Quality Hill Development Corp., 641 A.2d 746 (R.I. 1994), plaintiffs alleged that a local building inspector failed to properly inspect condominiums and approved construction work which violated the building code. Id. at 747-748. The city argued that it could not be held liable for defective construction because its "permits and the inspections are not insurance policies wherein the municipality guarantees that each building is in compliance with the code." 641 A.2d at 750. However, the Rhode Island Supreme Court disagreed and ruled that the city would be liable if plaintiffs were able to prove: (1) that a special duty was owed to the plaintiffs, or (2) that the city's conduct was egregious. 641 A.2d at 750.[10] (emphasis added).

Two years later, the Rhode Island Supreme Court again ruled that a building inspector could be held liable for the negligent performance of his duties. In Boland

[10] The Rhode Island Supreme Court found it unnecessary to analyze the facts of this case under the egregious conduct exception to the public duty doctrine because it first found that a special duty existed. Quality Court Condominium Assn., 641 A.2d at 751.

v. Tiverton, 670 A.2d 1245 (R.I. 1996), the town building inspector issued a certificate of occupancy despite the fact that the house construction was incomplete and building code violations existed when he inspected the premises. Id. at 1246. Subsequently, plaintiffs filed suit against the Town of Tiverton alleging "negligent performance of the building inspections by the Town's building inspector." 670 A.2d at 1247. The Rhode Island Supreme Court vacated the order which granted summary judgment to the Town of Tiverton holding, "[T]his court notes that the record before us contains sufficient facts that, if more fully developed at trial, as in Quality Court, could probably support a finding of either a special duty owed to the Bolands or egregious conduct by the Town." 670 A.2d at 1249. The court explained that an action can be founded upon a building inspector's negligence:

> We understand that, when making her decision in this case, the trial justice did not have available to her the benefit of Quality Court, supra, and its discussion of the relationship between the enforcement of the building code and the liability of municipalities for the negligence of its building inspectors.

670 A.2d at 1249. (emphasis added). More recently, the Rhode Island Supreme Court has continued to analyze negligent building inspection cases under the special duty and egregious conduct exceptions to the public duty doctrine. For instance, in Haworth v. Lannon, 813 A.2d 62 (R.I. 2003), plaintiff's allegations were analyzed under the egregious conduct exception:

> . . . plaintiffs have not presented any evidence that the Town, before its issuance of the certificate of occupancy, was so negligent that its inspection amounted to egregious conduct or created a situation of extreme peril that it then disregarded.

813 A.2d at 65-66. (emphasis added). Similarly, in Torres v. Damicis, 853 A.2d 1233 (R.I. 2004), the Rhode Island Supreme Court ruled that plaintiff's claims

against a town building inspector could go forward if he could "prove that his circumstances qualify under one of the exceptions to the public duty doctrine" Id. at 1239.[11] Clearly, Haworth and Torres would not have reached the issue of whether the municipality acted in an egregious manner if an actionable duty did not exist. The distinction between a statutory duty to take action and the common law duty to exercise care after the voluntary assumption of a duty was succinctly stated by the Alaska Supreme Court:

> We do not reach the issue of whether the State had a statutory duty to take action concerning hazards discovered at the Gold Rush, because we find that the State assumed a common law duty by its affirmative conduct. It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully . . .

Adams v. State, 555 P.2d 235, 240 (1976) (emphasis added).

Rhode Island law follows this "ancient learning." See for example, Izen v. Winoker, 589 A.2d 824 (R.I. 1991).

As discussed above, the doctrine of sovereign immunity, the public duty doctrine and its exceptions vary from state to state. The law of Kentucky or Vermont is not relevant as to whether or not there can be governmental liability for negligent inspection activity. Each state has developed its own (often confusing) governmental tort liability scheme.

For instance, in Commonwealth of Kentucky v. Brown, 605 S.W.2d 497 (Ky. 1980), the Kentucky Supreme Court distinguished the Kentucky Tort Claims Act from the Federal Tort Claims Act and the Florida Tort Claims Act (both similar to

[11] In both Haworth and Torres, the plaintiffs appealed from grants of summary judgment where no issue of material fact existed as to whether the special duty or egregious conduct exceptions to the public duty doctrine applied. Haworth, 813 A.2d at 63; Torres, 853 A.2d at 1253. Importantly, both cases had the benefit of discovery, unlike the case at bar.

Rhode Island's Tort Claims Act) by stating, "Both of these statutes, by express terms, provide that the government is to be treated as if it were a private individual. Our statute mandates no such treatment of the Commonwealth." Id. at 498. Of course, both the Federal Tort Claims Act and the Rhode Island Tort Claims Act indicate that the government shall be liable in the same manner as a private individual. 28 U.S.C. § 2674, R.I. Gen. Laws § 9-31-1. The case of Corbin v. Buchanan, 163 Vt. 141, 657 A.2d 170 (1995) is also distinguishable in that the Supreme Court of Vermont upheld a town's ordinance which expressly prohibited a private cause of action against the town.[12]

The State Defendants argue that Plaintiffs' tort actions are not expressly created within the R.I. Fire Safety Code. Plaintiffs do not rely on that statute as creating their rights. The State Defendants had a common law duty to exercise reasonable care after undertaking the specific inspections which occurred at The Station. This duty was recognized in Quality Court Condominium Assn., Boland, Haworth, and Torres. Plaintiffs do not allege that their cause of action arises directly from the Fire Safety Code; but, rather, that the Code serves as evidence of the proper standard of care to be followed if an inspection is undertaken.

Furthermore, Plaintiffs have alleged that "Several of Defendant Larocque's actions or omissions constitute the commission of a crime or offense" giving rise to a separate statutory right of recovery for all injuries pursuant to R.I. Gen. Laws § 9-1-2 which provides:

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[12] The State Defendants ask this Court to seek guidance from the Vermont caselaw. However, in Hillerby v. Town of Colchester, 167 Vt. 270, 276, 706 A.2d 446, 449 (1997), the Supreme Court of Vermont expressed its dissatisfaction with the Vermont municipal liability scheme: "Our refusal to abolish the governmental/proprietary distinction should not be read as an endorsement...we point out...that many courts, legislatures, and commentators have strongly criticized this method of determining municipal liability."

> **9-1-2. Civil liability for crimes and offenses. --** Whenever any person shall suffer any injury to his or her person, reputation, or estate by reason of the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender, and it shall not be any defense to such action that no criminal complaint for the crime or offense has been made . . .

Thus, apart from the existence, vel non, of tort liability in the absence of this statute, the statute creates independent liability if its requirements are satisfied. If a crime (or offense) results in injury, liability follows, without more.

Plaintiffs have alleged that the State Defendants (and Larocque) are guilty of egregious negligence.

In Rhode Island, manslaughter is a common law crime, State v. Pina, 524 A.2d 1104 (R.I. 1987), the punishment for which is statutory (R.I.G.L. §11-23-3).

Involuntary manslaughter has thus been defined in this state:

> This court has long held that the crime of involuntary manslaughter may be based upon proof that a defendant has been guilty of gross negligence and that such gross negligence is equated with the term "criminal negligence."

State v. Cacchiotti, 568 A.2d 1026, 1030 (R.I. 1990) (See also, State v. Robbio, 526 A.2d 509 (R.I. 1987)).

Ironically, the State has indicted the Derderians under a perfectly analogous theory. As to each victim, two counts are charged. The State has alleged that the Derderians did:

> a) perform a legal act with criminal negligence, on days and dates between the 1st day of March, 2000 through and including the 20th day of February, 2003 at West Warwick in the County of Kent, which on February 20, 2003 unintentionally and prematurely caused the death of . . . in violation of §11-23-3.[13]

[13] This, of course, is the common law crime of manslaughter discussed in Cacchiotti and Robbio, supra.

> b) perform an unlawful act not amounting to a felony, to wit the violation of §23-28.6-15 of the General Laws of Rhode Island, 1956, as amended (Reenactment of 2002) which unintentionally and proximately caused the death of . . . in violation of §11-23-3.

This second count is, of course, based on violation of the Fire Safety Code. Plaintiffs have also alleged such a violation by the State Defendants, *viz*. those provisions dictating strict enforcement by inspectors.

It is unknown at this time what efforts, if any, were made by the State to investigate the possibility of indicting the inspectors. That no such indictment has yet been forthcoming (and may never be) is irrelevant under R.I. Gen. Laws § 9-1-2.

Furthermore, there is at least one other common law crime that is applicable to Plaintiffs' cases. R.I. Gen. Laws § 11-1-1 provides:

> **11-1-1. Common law offenses not covered by statute. --** Every act and omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at common law. Every person who shall be convicted of any offense which is a misdemeanor at common law shall be imprisoned for a term not exceeding one year or be fined not exceeding five hundred dollars ($500). Every person who shall be convicted of any offense which is a felony at common law shall be imprisoned for a term not exceeding five (5) years or be fined not exceeding five thousand dollars ($5,000).

In State v. LaPlume, 118 R.I. 670, 375 A.2d 938 (1977), the Rhode Island Supreme Court held that "Since this section [11-1-1] makes every act which is an offense at common law punishable in Rhode Island, the Legislature intended to preserve and not impair or abrogate the common law." Id. At 678, 942. The negligent failure of an officer to perform a ministerial duty imposed upon him by law is a common law misdemeanor. State v. Winne, 21 N.J.Super. 180, 203, 91 A.2d 65, 76 ("[I]t is a general rule of the common law that willful neglect or failure

or a public officer to perform any ministerial duty which by law he is required to perform is an indictable offense."); LaTour v. Stone, 39 Fla. 681, 692, 190 So. 704, 709 (1939)("At common law a failure or neglect of an officer to perform a ministerial duty imposed upon him by law renders him guilty of a misdemeanor; and it would seem that, notwithstanding the provisions of a statute which have been disobeyed are, as respect to public, merely directory, the neglect of the officer to observe them may be a misdemeanor.").

In Larmore v. State, 180 Md. 347-348, 350, 24 A.2d 284-286 (1942), a conviction of criminal misfeasance was upheld where county commissioners negligently approved and passed for payment fictitious and fraudulent claims.

2. A Non-Governmental Analysis Of "Duty" Does Not Compel Dismissal In Favor Of The State Defendants

The entirety of the State Defendants argument under this heading relates to issues regarding proximate cause, i.e. foreseeability of injury, the connection between the Defendants' conduct and that injury, and the intervening acts of third parties. Plaintiffs address all of these issues in the next section.

B. The Negligent Conduct Of The State Defendants Was At Least A Concurring Proximate Cause Of Plaintiffs' Injuries And They Are Not Insulated By Any Intervening Acts Of Others

The State Defendants argue that their actions were not "the proximate cause" of the injuries sustained by Plaintiffs. In addition, the State Defendants argue that the illegal actions of other defendants supercede any negligence on their part. But all such questions of legality and causation remain questions of fact in this case. Moreover, the State Defendants' reliance upon Rhode Island case law completely ignores cases upholding concurrent proximate causes of injuries.

The State Defendants have misconstrued the meaning of Rule 8(e)(2)'s reference to "inconsistent" and "alternative" pleadings. For instance, they argue that Plaintiffs' "Complaint in the case at bar demonstrate[s] that the non-fire retardant foam was misused in that the Derderians installed it around the stage as soundproofing without ensuring that the material was fire resistant as required by Rhode Island Law." State Defendants' Memo., p. 30. It cannot be ignored that Plaintiffs' Complaint also clearly alleges that the State Defendants' negligence was the proximate cause of Plaintiffs' injuries. This inconsistent/alternative pleading is clearly permissible. As stated by the First Circuit Court of Appeals:

> This argument fails adequately to take into account a procedural provision, in Federal Rule of Cvil Procedure 8(e)(2), that allows parties to take inconsistent positions in their pleadings. Especially at the early stages of litigation, a party's pleading will not be treated as an admission precluding another, inconsistent, pleading.

Rodriquez-Suris, et al v. Montesinos, et al, 123 F.3d 10, 21 (1st Cir. 1997). Therefore, it is improper for the State Defendants to utilize portions of Plaintiffs' Complaint as admissions in an attempt to further the State Defendants' allegations that the acts of others superceded the State Defendants' negligence, especially where those allegations have not been incorporated by reference (or otherwise) in the counts directed against the State Defendants.

In any event, it was reasonably foreseeable that fire safety code violations and overcrowding would result in harm.

As is true with the issue of legal duty, a key determinant on the issue of superseding causation is foreseeability; that is, was it or should it have been reasonably foreseeable to Owens and Larocque that their alleged negligent conduct

could be expected to lead to harm?[14] This court has noted that the determination of proximate causation and the existence of any superseding cause is a question of fact. Spendorio v. Bilray Demolition Co., Inc., 682 A.2d 461, 467 (R.I. 1996). Proximate cause is proven by showing that "but for the negligence of the tortfeasor, injury to the plaintiff would not have occurred." Martinelli v. Hopkins, 787 A.2d 1158, 1169 (R.I. 2001). If two individuals' acts cause one injury, both individuals are liable:

> It should be noted that the plaintiff was not required to prove that the town's negligence was *the* proximate cause for his injuries and damages, but only that it was *a* proximate cause which, standing alone, or in combination with any other defendant's negligence, contributed to the plaintiff's injuries.

Martinelli, 787 A.2d at 1170. (emphasis added by court). In Denisewich v. Pappas, 97 R.I. 432, 436, 198 A.2d 144, 147-148 (1964), the Rhode Island Supreme Court explained that "an intervening act will not insulate a defendant from liability if his negligence was a concurring proximate cause which had not been rendered remote by reason of the secondary cause." Explained a different way in Roberts v. Kettelle, 116 R.I. 283, 294-295, 356 A.2d 207, 215 (1976), the Rhode Island Supreme Court ruled that "for negligent conduct to be considered a past condition...such negligent conduct must have become totally inoperative as a cause of the injury."

[14] If the independent or intervening cause is reasonably foreseeable, the causal connection remains unbroken. S.M.S. Sales Co., Inc. v. New England Motor Freight, Inc., 115 R.I. 43, 47, 340 A.2d 125, 127 (1975), citing Aldcroft v. Fidelity & Gas Co., 106 R.I. 311, 259 A.2d 408 (1969); and Denisewich v. Pappas, 97 R.I. 432, 198 A.2d 144 (1964).

One very instructive judicial effort to define foreseeability is found in Bigbee v. Pacific Telephone and Telegraph Company, 192 Cal.Rptr. 857, 665 P.2d 947 (1983) which ruled:

> It is well to remember that foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.

Id. at 862, 57 and 952, citing 2 Harper & James, Law of Torts, (1956), § 18.2, at p. 1020. One may be held accountable for creating even "the risk of a slight possibility of injury if a reasonably prudent [person] would not do so." Id. (citing, Ewart v. Southern Cal Gas Co., 237 Cal.App.2d 163, 172, 46 Cal.Rptr. 631 (1965), quoting, Vasquez v. Alameda, 49 Cal.2d 674, 684, 321 P.2d 1 (dis. opn. of Traynor, J.) [emphasis added]. Finally, the Rhode Island Supreme Court has ruled that "what is required to be foreseeable is the general character of the event or harm... not its precise nature or manner of occurrence." Id. See also Hueston v. Narragansett Tennis Club, Inc., 502 A.2d 827 (R.I. 1986).

The failure to identify and/or order the remediation of violations of the R.I. Fire Safety Code and the failure to provide proper fire inspection training were substantial causes of the injuries and deaths that resulted on February 20, 2003. The risk of fire in a nightclub, and elsewhere, can come in many forms, only one of which includes the use of a pyrotechnic display by a rock and roll band.[15] In no

[15]The Court can take judicial notice that in a nightclub setting like The Station, there is a foreseeable risk of fire from a number of sources. Patrons come to a nightclub for the primary purpose of enjoyment that, depending upon the individual, can include listening to live music, dancing, and socializing with friends and acquaintances. However, this is frequently done in a crowded, poorly illuminated environment. Along with this comes alcohol consumption, and frequent cigarette smoking that requires use of lit matches or lighters. If a nightclub like The Station presents live music, high-powered amplifiers, musical instruments and related equipment requiring a substantial electrical power source are common. Inevitably, stage lighting is used as well, not only requiring

way was the harm here of a kind and degree so far beyond the risk foreseeable to the state fire marshal and deputy state fire marshal that it would be unfair to hold the State Defendants responsible. In fact, the opposite is true. The inspections are important because of the very foreseeability of untoward events.

The State Defendants rely upon Travelers Insurance Co. v. Priority Business Forms, Inc., 11 F.Supp.2d 194 (D.R.I. 1998), which ruled "the commission of arson by a third party is not the natural and probable result of discontinuing a burglar alarm system and failing to notify the landlord thereof." Id. at 200. (emphasis added by court). The facts of Plaintiffs' action are readily distinguishable from the facts of Travelers Insurance Co. First, there is no allegation that someone intentionally ignited The Station, unlike the intentional act of arson in Travelers Insurance Co. Second, unlike Travelers Insurance Co., where the court emphasized the fact that a burglar alarm system was discontinued prior to the fire at the premises, it is clear that the R.I. Fire Safety Code was enacted to "safeguard life and property from the hazards of fire and explosives" R.I. Fire Safety Code § 1. The particular source of the fire has no bearing on Plaintiffs' action because, regardless of the ignition source, Owens and Larocque's actions/inactions had not become "totally inoperative" by the time of the fire, as required by Hueston. The failure to remediate was still operative (or so the trier of fact would be warranted in finding).

Defendants' reliance upon Wallace v. Ohio Dept. of Commerce, 2003 WL 22976565 (Ohio App. 10 Dist.) is similarly misplaced. In Wallace, the cause of the

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additional power sources but generating significant heat. In such a case, the risk of fire is even greater as some performers may produce and present stage shows that are more elaborate, employing props and pyrotechnics.

fire was arson. Id. at 6. Furthermore, the relevant facts of Wallace were that an annual inspection had not occurred. Id. at 4. Finally, the Wallace opinion specifically states, "In this case, for example, *Reynolds* arguably bars liability for the fire marshal's actions if the appellants' harm resulted from a *discretionary* executive decision to forego a seasonal inspection; if, on the other hand, the fire marshal's negligent *performance* of an inspection was the proximate cause of the appellant's harm, R.C. 2743.02(A)(1) allows for liability against the state." Id. at 4. Wallace is not only easily distinguishable from the case at bar, it supports Plaintiffs' position.

Even in situations where an intentional criminal act occurs, liability may still attach to other defendants. For instance, in Welsh Manufacturing, Division of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984), the defendant security service corporation hired a security guard who took part in thefts of the plaintiff's property, while he was on duty at the plaintiff's premises. Id. at 438. The Rhode Island Supreme Court ruled that the criminal acts were reasonably foreseeable:

> We are of the opinion that Lawson's succumbing to temptation and his participation in the criminal thefts might be found by a rational trier of fact to be a reasonably foreseeable result of Pinkerton's negligence in taking reasonable steps to assure its employee's honesty, trustworthiness, and reliability.

474 A.2d at 444. The Court went on to rule that the foreseeability of the criminal act was a jury question. 474 A.2d at 444. In addition, in Gercey v. U.S., 409 F.Supp. 946, 954 (D.R.I. 1976), this Court ruled that an intentional or criminal act may merely be a concurrent cause if the act is one which the "defendant might reasonably anticipate and against which it would be required to take precautions."

IV. Conclusion

The State Defendants' Motion to Dismiss should be denied. It is clear that there are factual issues that require exploration through discovery.

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